

3

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 ON PAGE B-3

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Reporter's Notebook: CBS Jury Cautioned on Sharon Parallels

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Last Thursday, when word spread of a final verdict in the libel trial of Ariel Sharon's \$50 million suit against Time magazine, there was an exodus of reporters and spectators from room 318 in the United States Courthouse on Foley Square.

They scrambled for room 110, where, after two months, the Sharon trial was ending. But, in room 318, the longer and more complex of the two trials that have made "libel" a buzzword in and beyond the courthouse continued apace. There, Judge Pierre N. Leval is presiding over Gen. William C. Westmoreland's \$120 million suit against CBS and three individual defendants.

At the end of the day, Judge Leval took note of the action two floors below. He cautioned the jury — which has been allowed to follow news accounts of even its own case — that the Westmoreland trial "is not any other case, and you are not to let yourselves be influenced by the results of any other case."

It was the second time the judge had expressed such concern. When the Sharon jury began its deliberations, he said that "all of you may well be aware that there is another case in this courthouse as to which parallels or comparisons have been drawn from time to time in the press with this one."

But the Sharon case, he said, "is absolutely and totally different from this one. If you take two automobile accidents, they have nothing to do with each other. One is one, the other is the other," he said, and they involve "two completely different sets of facts."

The Sharon case pivoted on statements in one paragraph of a Time cover story about the Israeli investigation of the 1982 massacre by the Phalangists, a Christian faction in Lebanon. The case before Judge Leval turns on the entirety of a 90-minute 1982 CBS Reports documentary that accused General Westmoreland's command in Vietnam in 1967 of deliberately understating enemy strength, to show progress in the war.

But the Westmoreland case, which has generated what Judge Leval once estimated to be "millions of pieces of paper," is drawing to a close, too. The judge gave the lawyers for each side in the case 150 hours to present their evidence and cross-examine and, as of Thursday afternoon, when court recessed for the weekend, General Westmoreland's side had used nearly 130 hours and CBS's, 107. The lawyers are now predicting that summations may start as early as Feb. 21, with the case going to the jury that weekend.

What the jurors have made of the conflicting, highly statistical evidence so far — if they have made anything of it at all — cannot be gleaned from their faces or body gestures. The lawyers are looking for signs but, if they are there, they are usually too cryptic or too fleeting to mean much.

While one female juror has a ready smile for almost any joke offered up by David Boies, the principal lawyer for CBS, even Mr. Boies doesn't know whether she just likes to laugh. Many found reason to laugh the other day when Mr. Boies, having objected to some maneuver by the plaintiff's lawyer, conceded that he was "in a little difficult position, because basically I don't believe there's anything wrong with it." They laughed, too, when Judge Leval ordered a witness to answer a question with "yes or no or anything in between."

Yet some jurors have shown virtually no emotion, since testimony began on Oct. 15, and some have turned their chairs away from witnesses from time to time. But whether this should be interpreted as momentary indifference or boredom, or as nothing more than a human need to shift one's weight or re-focus one's eyes, is not something that the lawyers in room 318 have figured out yet.

Certainly the jurors have had to

bear repetitive testimony, and it can be wearying. One afternoon last month a female juror complained of not feeling well. Judge Leval, who maintains an air of civility in his courtroom even as the parties fight over whether a wartime commander sought to deceive his President, was solicitous of the juror's health. The woman explained, during a conference in his robing room, that she didn't feel badly except in the courtroom.

"Just I sit in there, I start to feel dizzy," she said. "And then I feel throw up." But, in the end, the juror went back for more. And, for the record, her discomfort was laid to a bowl of chicken soup she had downed at lunch.

The defense, which began its presentation of evidence three weeks ago, has only four major witnesses left: Two — Col. Gains Hawkins and Maj. Gen. Joseph A. McChristian — were senior intelligence officers in Saigon in 1967. Two — Roger Colloff, a former vice president of CBS News, and Mike Wallace, who narrated the documentary — were involved in the making of the broadcast 14 years later. Mr. Wallace is one of the defendants in the case, as are George Crile, the producer of the program, and Samuel A. Adams, a former Central Intelligence Agency analyst who was a paid consultant for the broadcast.

But, even as these men testify, the lawyers will be wrangling on another front. Last week, each side in the case gave Judge Leval a lengthy set of proposed instructions for the jury. Immediately, each side objected to much of the language of his opponent.

For example, Mr. Boies would have the judge tell the jury that its verdicts regarding each defendant — each of the four, including CBS, stands separately before the jury — must be unanimous. But Dan M. Burt, General Westmoreland's lawyer, suggested that, while the judge instruct the jury that "they should strive" for unanimity, "less than unanimous" verdicts would be "acceptable."

Both sides would have to agree to go along with verdicts that were other than unanimous but, at this stage, that seems unlikely. Mr. Burt said in an interview that verdicts of, say, 11 to 1 or 10 to 2, would reduce the possibility of a "hung jury." But Mr. Boies said that, unless and until the jury indicated that it was deadlocked, he saw no reason to depart from the normal practice of unanimity.

Unlike most Federal civil cases, which are heard by juries of 6 members, there are 12 jurors in what is officially known as "82 Civ 7913." Before the trial, Judge Leval said he thought a panel of 12 was "more appropriate" to this case, given the "monumental issues."

The Westmoreland case has also involved an unusually high number of lawyers; indeed, there may be a lawyer for every juror. Two of the lawyers in room 318 represent, not the plaintiff or the defendants, but the C.I.A. and the National Security Agency. They are there, they say, to see that no classified information pops out of a witness's mouth. Still

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another lawyer represents companies with whom CBS has libel insurance and, occasionally, he volunteers ideas on strategy.

While Mr. Boies and Mr. Burt have conducted most of the examination of the witnesses, a half-dozen lawyers associated with each of them have performed every task from writing briefs to taking depositions to hauling across the courtroom the six-foot-high blow-ups of cables and memorandums that have figured in the case.

In recent days, the cross-examination of two key CBS witnesses has been handled by David M. Dorsen, a litigator from the Washington law firm of Sachs, Greenebaum & Taylor who, when he's not busy at this kind of

bar, reviews restaurants in the Capital. The interrogations by Mr. Dorsen, a former Federal prosecutor who is widely regarded as more at ease in the courtroom than Mr. Burt, fueled rumors of a split within the plaintiff team. On the other hand, Mr. Dorsen, who has long worked with Mr. Burt on the case, had deposed both of the witnesses, Mr. Adams and George W. Allen, former deputy chief of Vietnamese affairs for the C.I.A.

On the CBS side, Mr. Boies let the limelight fall last week on William F. Duker, a 1981 graduate of Yale Law School. Mr. Duker took over the questioning of the current witness, Douglas Parry, a former C.I.A. analyst. But no lawyer has worked harder on the case for CBS than Robert H.

Baron, a 1981 graduate of Harvard Law School who, like Mr. Duker, is an associate at the firm of Cravath, Swaine & Moore.

When Mr. Boies is standing at a lectern posing questions, Mr. Baron is often in Mr. Boies's green leather armchair — passing him, in manila folders, notes and advice and documents. An unresolved issue is whether Mr. Baron ever sleeps. Once, before trial, he flew from New York to San Francisco, back to New York, on to Frankfurt, West Germany, and back again to New York, interviewing prospective witnesses at each stop. It was all done in 48 hours.

Some say Mr. Baron then took a nap. Mr. Boies says Mr. Baron took another deposition.